



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10
1200 Sixth Avenue, Suite 900
Seattle, Washington 98101-3140

JUL 20 2009

RYAN SWANSON CLEVELAND

JUL 22 2009

RECEIVED

Reply To: OCE-084

CERTIFIED MAIL: RETURN RECEIPT REQUESTED

Mr. Eitan Alon
Rainier Commons LLC
Ariel Development LLC
Ethan Construction LLC
3317 3rd Avenue South
Seattle, Washington 98134

Re: SUBMITTAL OF REVISED PROPOSED CLEAN-UP ACTION PLAN
Unauthorized Use and Disposal of PCBs at Rainier Commons Facility

Dear Mr. Alon:

The purpose of this letter is to summarize and document the actions that the United States Environmental Protection Agency (EPA) is requesting of Rainier Commons LLC ("Rainier") as owner of the Rainier Commons Facility (RCF) located at 3100 Airport Way South in Seattle, Washington. To the extent that RCF has been operated by Ariel Development LLC ("Ariel") and/or Ethan Construction LLC ("Ethan"), these organizations are also subject to the requested actions.

There are polychlorinated bi-phenyls (PCBs) in applied dried paint at RCF. This paint is in use on the exterior of the buildings. There are also chips of paint that have been released from the buildings and have come to be located on ground surfaces, in catch basins and storm drains, and elsewhere. The known concentration of PCBs in the paint is up to 10,000 part per million (ppm).

The proposed Cleanup Action Plan (CAP), dated April 29, 2009, which Rainier provided for RCF, is not acceptable to EPA. You were informed of this determination during our conference calls on June 18 and June 29, 2009. During the latter call, in which the Washington Department of Ecology (WDOE) was also a participant, you were further advised that a revised proposed CAP needs to be provided to EPA within 30 days of the call. Considering the timing of this letter, EPA is willing to extend this submission date to no later than **August 21, 2009**. At a minimum, the revised proposed CAP must include the following elements of work:

- (1) characterization of the nature and extent of PCBs in paint on buildings at RCF;
- (2) description of the process and activities for removal of paint containing PCBs at a concentration of equal to or greater than 50 ppm from buildings at RCF;
- (3) description of the process and activities for collection of chips of paint that may have been released from buildings at RCF;

(4) description of the method for storage and disposal of PCB-containing paint and paint chips;

(5) description of the process and activities for identification of PCBs that may be present in the substrate of buildings at RCF;

(6) schedule for initiation and completion of the characterization, removal, collection, storage, disposal, and identification of work to be undertaken as prescribed in elements (1) through (5) above; and

(7) cost estimate for the work to be undertaken in elements (1) through (5) above.

As you were informed during our conference calls, as well as in my letter to you dated June 9, 2009, Rainier is not in compliance with either the Federal regulations established under the Toxic Substances Control Act (TSCA), or with the specific requirements of the statute itself. For the past 31 years, the use of PCBs other than in a totally enclosed manner has been prohibited by Section 6(e)(2)(A) of TSCA, 15 U.S.C. § 2605(e)(2)(A). PCBs in paint is not identified at 40 C.F.R. § 761.20 as the use of PCBs in a totally enclosed manner. Further, 40 C.F.R. § 761.30 does not authorize the use of PCBs in paint.

Unless PCBs are both authorized for use and in use in a totally enclosed manner, the PCBs are a toxic waste, which must be disposed of in accordance with Federal law. Any applied dried paint, wherever found, which contains PCBs at a concentration of equal to or greater than 50 ppm is *PCB bulk product waste* according to 40 C.F.R. § 761.3, and as such must be disposed of pursuant to the requirements of 40 C.F.R. § 761.62. If any portion of the substrate of buildings is found to also be contaminated by PCBs, then the contaminated material is *PCB remediation waste* according to 40 C.F.R. § 761.3, and as such must be addressed in the manner prescribed by 40 C.F.R. § 761.61.

PCB-containing paint chips which have been released, and continue to be released, from buildings at RCF are of immediate concern to EPA. These chips have been released into catch basins and storm drains and are likely being deposited into the Lower Duwamish Waterway (LDW). As you are aware, the LDW is a Federal Superfund Site primarily because it is contaminated by PCBs.

PCB-containing paint chips have also been observed on ground surfaces at RCF. These toxic chips could inadvertently be transported by shoes, vehicles, winds or in some other way to locations inside and outside of RCF, including private homes and yards as well as public areas. As these chips may pose an exposure risk, Rainier should take appropriate precautions with respect to employees, lessees, residents and visitors at RCF.

During our conference calls, Rainier has maintained that while peeling paint could be removed from the buildings, it would not be feasible or safe to remove the remaining paint. Instead, Rainier proposed to cover this paint with a coating ("encapsulation") and then monitor the condition of the buildings and remove any peeling paint before it is released. Even if the

actions proposed by Rainier were not prohibited by TSCA, we believe these actions as a practical matter would fail to achieve the objective of keeping PCBs from being released from buildings at RCF. Applying a coating to the exterior surface of paint is not likely to prevent the continued peeling of such paint, because the peeling is caused by failure of the underlying coat and the innermost paint surface to properly adhere to the substrate of the buildings.

The maintenance plan suggested by Rainier is also problematic. Given the height of the buildings and the large amount of exterior surface areas, it does not seem possible to monitor all areas at all times in a way that would prevent the ongoing release of paint chips. It is reasonable to assume that rain, wind and other factors could continually degrade and loosen chips from the buildings before Rainier could take preventative actions.

In addition to the legal prohibition and practical difficulties outlined above, Rainier is advocating a course of action that has already been tried but has failed to prevent ongoing releases of PCBs. For example, during an inspection of RCF on March 24, 2009, EPA discovered peeling paint on the exterior of buildings and paint chips on ground surfaces. Analysis of samples taken during the inspection revealed PCBs at a concentration of 700 ppm in the peeling paint and 10,000 ppm in a paint chip picked-up from the ground. During the inspection, Rainier acknowledged that it had painted over the PCB-containing paint in 2005 in an attempt to encapsulate it.

Subsequent to our conference calls, EPA obtained documents from King County that also demonstrate PCB releases occurring after the encapsulation attempt. These documents include the Catch Basin Sediment Field Work Plans (May 2006), Catch Basin Sediment Field Sampling Results Report (June 2006), and PCB Based Paint Building Operation & Maintenance Plan (January 2007) which were prepared by Rainier, Ariel and/or Ethan. These documents show PCBs in catch basins and storm drains at RCF based on an inspection conducted by Seattle Public Utility in October 2005 (with concentrations up to 2,200 ppm) and from sampling conducted by Rainier in May 2006 (with concentrations up to 2,300 ppm).

In the Operation & Maintenance Plan, Rainier recognized that the Federal regulations at 40 C.F.R. Part 761 were applicable to PCBs in paint, but incorrectly concluded that requirements pertaining to lead-based paint should be used. This error could have been avoided had Rainier contacted EPA for clarification. However, the Plan states that Rainier chose not to notify EPA for review and acceptance of the Plan.

The data and observations gathered during the course of the past several years have demonstrated that paint chips from RCF are a continuing source of PCBs in sediments in storm drains that discharge to the LDW. Given this information, EPA believes that removal and disposal of the PCB-containing paint is necessary to protect human health and the environment. As a result, Rainier will now need to focus its efforts on the proper removal and disposal of PCBs.

Please be aware that each release of PCB-containing paint is a potential violation of disposal requirements for *PCB bulk product waste* set forth at 40 C.F.R. § 761.62. Also, the use of PCBs in paint is potentially a continuing violation of Section 6(e)(2)(A) of TSCA, 15 U.S.C.

§ 2605(e)(2)(A), and 40 C.F.R. §§ 761.20 and 761.30. According to Sections 16(a) and 15(1) of TSCA, 15 U.S.C. §§ 2615(a) and 2614(1), and 40 C.F.R. Part 19, each day of any such violation could carry an associated civil penalty of up to \$37,500. These references are meant to be examples rather than all-inclusive of the potential violations of Federal law in this matter.

Please also understand that Section 17(a) of TSCA, 15 U.S.C. § 2616(a), authorizes EPA to request action by a district court to restrain any violation of TSCA or the PCB-regulations. In addition, if necessary, EPA may take action in accordance with the Clean Water Act, 33 U.S.C. § 1251 et seq., and/or the Comprehensive Environmental Response Compensation and Liability Act, 42 U.S.C. § 9601 et seq., to abate a release or threat of release of PCBs.

Please contact me at (206) 553-0682 or downey.scott@epa.gov, or Daniel Duncan, Regional PCB Program Coordinator, at (206) 553-6693 or duncan.daniel@epa.gov, if you have any questions regarding this letter. Please direct all inquiries from counsel to Richard Mednick, Associate Regional Counsel, at (206) 553-1797 or mednick.richard@epa.gov. EPA looks forward to receiving a timely proposed revised CAP from Rainier that properly addresses the PCB-contamination at RCF.

Sincerely,



Scott E. Downey, Manager
Pesticides and Toxics Unit

cc: Dan Cargill, WDOE
Jim Stifford, King County
Bob Wright, WDOE
Mike Jeffers, WDOE
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